

BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 5737-g76LJ BY FONDA AND KAREN)
FISHER)

PROPOSAL FOR DECISION

A hearing on objections to the above-entitled application was held on Monday, June 14, 1976 at Kalispell, Montana. The Applicant, Mr. Fonda Fisher, was present and was represented by counsel, Mr. Leonard Kaufman of Kalispell, Montana.

The following objectors were present or were either represented at the hearing: Mrs. Jerome M. Sand for the objection of Mr. and Mrs. Jerome M. Sand; Mr. Raymond E. Bunker on behalf of his own objection and the objection of his son Mr. Kenneth R. Bunker; Mr. R. C. Tallada, Chairman, Cayuse Prairie - Lake Blaine Planning Group on behalf of the objection of that group; Mr. Thomas J. Arnone on behalf of the objection of Mr. and Mrs. Thomas J. Arnone; Mrs. Glenn Conklin on behalf of the objection of Mr. and Mrs. Glenn H. Conklin; Mr. Clarence A. Watts on behalf of his objection; Mrs. Dexter Vail on behalf of the objection of Mr. and Mrs. Dexter Vail; Ms. Eva L. Mathewson on behalf of her objection and Mr. and Mrs. W. A. Blood on behalf of their objection. Mr. James Rehbein, Water Rights Field Office, Department of Natural Resources and Conservation in Kalispell, appeared and presented testimony on behalf of the Department. Mr. Harold Small also made an appearance and was represented by his attorney Mr. Douglas D. Dasinger of Kalispell.

CASE # 5737

Based on the record herein, the following Proposed Findings of Fact are made as required by the Montana Administrative Procedure and Water Use Act;

PROPOSED FINDINGS OF FACT

1. The Applicant's Mr. and Mrs. Fisher have requested to appropriate 3 cubic feet per second or 1,347 gallons per minute of water, not to exceed 475 acre-feet per year from a spring, a tributary of Mooring Creek, Flathead County, Montana to be impounded in an enlarged existing reservoir with a new capacity of 4.99 acre-feet on said spring, at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 29 North, Range 20 West, M.P.M., and used for new irrigation on a total of 190 acres, more or less in said Section 10, from April 15 to October 15, inclusive, of each year.

2. At the hearing, the Applicant, Fisher, emphasized that this application was not for a total of 3 cfs or 1,347 gallons per minute of new appropriations but was rather an application for .7 cfs or 75 gallons per minute for use on 22 acres of new irrigation.

3. The Applicant introduced 6 exhibits at the hearing. The first exhibit was a photographic map of the area. The second exhibit was a 1963 filing for 1200 gallons per day stockwater for a complete year and 540 gallons per day for irrigation by Carl H. Wilke the predecessor in interest to Mr. Fisher. The third exhibit was a Soil Conservation Service sprinkler irrigation design. The fourth exhibit was a table listing the measurements at the outlet of the dam at the spring. The fifth exhibit was a 1946 Notice of Appropriation of Water Right filed by Charles A. Warkins and John M. Caldwell. The sixth exhibit was a slope map showing the percentages of slope of the Fonda Fisher Ranch.

4. Testimony by Mr. Carl Wilke shows that he irrigated approximately 170 acres of what is presently the Fonda Fisher Ranch. Mr. Wilke placed such system in operation in 1953 and later filed an appropriation for such use in 1963. Also Mr. Wilke testified that during the entire time he owned the ranch he ran anywhere from 70 to 130 head of cattle. Mr. Wilke also pointed out that prior to his ownership he was well aware that many head of cattle were utilizing Mooring Spring.

5. As shown by Applicant's Exhibit No. 5, Mr. Warkins and Mr. Caldwell filed a notice of appropriation January 2, 1946 for 5 cfs. The irrigation contemplated by Mr. Warkins and Mr. Caldwell is precisely the same irrigation system later established by Mr. Wilke starting in 1973 and now used by the Applicant, Mr. Fisher. It was to enlarge the dam on Cold Springs, (the same spring as covered by this application) back water up a ditch to pumps and pump the water precisely as it is now being pumped by Mr. Fisher and was previously pumped by Mr. Wilke. According to Mr. Wilke, there is no testimony that any of the construction pursuant to that appropriation commenced prior to Mr. Wilke obtaining ownership to their property.

6. The other objectors are located downstream from Mooring Springs and were concerned about the water purity as a result of such a large diversion from Mooring Springs. Their concerns seem to be answered when it was found out that this appropriation was just a small addition to that water already being used by Mr. Fisher and previously by Mr. Wilke.

Based upon the above Findings of Fact, the following Proposed Conclusions of Law are hereby made.

PROPOSED CONCLUSIONS OF LAW

1. The Applicant has an apparent prior water use right for 2.9 cfs or 1300 gallons per minute with a priority date of either 1953 or 1946 to irrigate 170 acres with intermittent use on an additional 40 acres of pasture land. This use is either based on a 1946 filing or a 1953 use right which was claimed in a 1963 filing.

2. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana. Such application should be revised downward to .17 cfs or 75 gallons per minute to be used on a total of 22 acres.

3. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a beneficial water use permit.

4. The rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.

5. The issuing of a Provisional Permit in no way reduces the Applicants liability for damage caused by the appropriation, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicants exercise of their Provisional Permit.

6. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made.

CASE # 5737

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicants Provisional Permit No. 5737-g76LJ is hereby granted allowing the appropriation of .17 cfs equivalent to 75 gallons of water per minute, not to exceed 55 acre-feet per year from a spring, a tributary of Mooring Creek, Flathead County, Montana to be impounded in an enlarged reservoir with a new capacity of 4.99 acre-feet on said spring at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section, Township 29 North, Range 20 West, M.P.M., and used for new irrigation on a total of 22 acres, more or less in said Section 10, from April 15 to October 15, inclusive of each year.

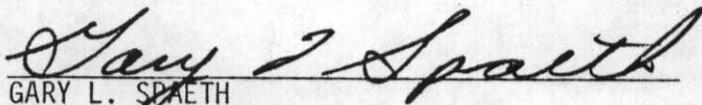
2. The Provisional Permit is granted subject to all prior water rights in the source of supply, including but not limited to those objecting to the applications and claiming existing water rights.

3. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided by Montana law.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to this Proposed Order, if any, shall be filed with the Department within ten (10) days of service among the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 3rd day of January, 1977.


GARY L. SPAETH
HEARING EXAMINER

CASE # 5737